

Litigation Summary

Plaintiffs argue that the defendants developed and approved FMP amendments that violate the MSA are arbitrary, capricious and contrary to law in violation of the APA.

The amendment did not:

- Contain an adequate assessment of the effects of fishing and fishing gear on EFH;
- (2) Contain an adequate identification and assessment of potential measures to minimize adverse effects of fishing on EFH;
- (3) Failed to impose practicable measures to minimize the impact of fishing activities on EFH.

Plaintiffs claim that bottom trawling and other fishing activities harm EFH.

- Various fishery management measures can be used to protect EFH from the effects of fishing activities such as these. However, defendants have failed to investigate adequately certain measures to determine whether they are practicable.
- Defendants have failed to identify, include, and implement practicable measures to protect EFH in these waters. These failures violate non-discretionary duties imposed upon defendants by the plain language of the MSA and implementing regulations.
- Additionally, plaintiffs argue that the defendants' approved these amendments in reliance upon inadequate environmental analyses in violation of the NEPA.

Plaintiffs claim that the EA contains an inadequate evaluation of the environmental effects of the proposed action. Therefore, the EA lacks justification for the agency's finding of no significant impact by and fails to:

- Evaluate the long-term or cumulative impacts of approving the amendments on EFH affected by ongoing fishing activities, including but not limited to bottom trawling;
- Adequately evaluate practicable methods to minimize the effect of fishing on EFH; and
- Address an adequate range of alternatives.

Court Decision Summary

Plaintiffs asked the court to consider:

- A declaratory judgment that defendants violated the MSA, NEPA, and the APA by approving the North Pacific EFH groundfish amendments;
- A remand of the legally deficient sections of the EFH groundfish amendments to defendants with instructions to revise them, and by a date certain, to comport with the requirements of the MSA, including the requirement to assess and minimize the adverse effects of fishing gears on EFH to the extent practicable, and
- An order requiring defendants to prepare a new analysis that complies with NEPA to accompany the revised EFH groundfish amendments and to include in that NEPA analysis an assessment of the long-term and cumulative environmental impacts of minimizing the adverse effects of fishing on EFH, along with a detailed assessment of alternative methods for protecting EFH.

Court Decision Summary (continued)

On September 14, 2000, the U.S. District Court for the District of Columbia issued the following memorandum opinion and order in the EFH lawsuit;

- The EFH Amendments did not violate the MSA, but they did violate NEPA. Therefore, the court ordered the Defendants to perform a new and thorough EA or EIS for all the challenge amendments, including Amendments 55/55, in compliance with the requirements of NEPA.
- The court issued a permanent injunction, enjoining Federal defendants from enforcing the EFH amendments until the Secretary performs a new, thorough, and legally adequate EA or EIS for each EFH Amendment, in compliance with the requirements of NEPA.

MSFCMA Claim

In determining whether the actions of the Defendants were non-compliant with the MSA and therefore in violation of the APA, the court applied a highly deferential standard of review of the agency's actions given the highly complicated scientific data that the agency must interpret. The court concluded that the Secretary's approval of Amendments 55/55 was reasonable, finding that the Secretary approved the amendments after considering whether the amendments complied with the MSA, given how little scientific information was available to the Council at that time.

The court also determined that it was reasonable for the Secretary to conclude that the amendments did not need to include additional protective measures, given the lack of scientific evidence available to the Council and the Secretary and the existing protective measures already in place.

NEPA Claim

In determining whether the actions of the Federal defendants were non-compliant with NEPA and therefore in violation of the APA, the court reviewed the EAs and concluded that each of the EAs were insufficient and failed to comply with the requirements of NEPA and the regulations promulgated by CEQ and NOAA. The court based this decision on several deficiencies:

- The EAs did not consider the factors for determining significance in deciding whether an EIS was necessary as outlined in NOAA's own Administrative Order on NEPA.
- All of the EAs discuss the environmental impacts of the proposed action and alternative(s) in vague and general terms, without discussing what the impact would be to the specific EFHs that the Amendments are intended to protect; and
- All of the EAs spent more time describing the proposed alternative and the requirements of NEPA than actually analyzing the proposed alternative and complying with the requirements of NEPA; and

NEPA Claim (continued)

- The EAs failed to consider all relevant and feasible alternatives and failed to fully explain the environmental impact of the proposed action and alternatives.
- The EAs did not meet the following four factors set for evaluating the legal adequacy of an EA or a FONSI.
 - The EAs did not take a “hard look” at the problem (the court found that there was no substantive discussion of the actual environmental consequences and impacts of fishing on the designated EFHs).
 - The EAs failed to identify the relevant areas of environmental concern (the court found that the EAs only discuss fish habitats in general terms, describing the types of EFHs that should be protected, but not specifying which EFHs needed protection and why).
 - The EAs failed to make a convincing case that the impacts from the action were insignificant.
 - Finally, the EAs failed to demonstrate that any significant impacts were mitigated by the alternative selected.

NMFS - TIMETABLE AND STATUS OF EIS ANALYSIS

Where are we now?

- Settlement discussions relative to the timetable for completion of the EFH EIS on the NPFMC FMPs are ongoing. The timetable we are working on at this time is consistent with that used to develop the groundfish EIS - 24 months; however, this is still under negotiation.
- NMFS/AKR is developing of Notice of Intent to conduct scoping on actions that need to be addressed by NMFS and the alternatives that might be examined in the NEPA analysis. This notice must describe the scoping process including logistics for meetings.

Where are we now? (continued)

- Concurrent with the scoping process, we are developing technical teams:
 - to standardized an analytical approach to quantify, to the extent practicable, the impact of fishing activities on EFH for each of the FMPs; how much habitat is needed to achieve MSY or some comparable metric of fisheries sustainability for each FMP; how much is currently being fished; how much is protected already; and finally,
 - to consider options for designating EFH other than the status quo.

Final Thoughts

Since the focus of the AOC v. Daley is the effects of fishing on EFH, the portion of the EIS dealing with options to address fishing impacts is considered most important. Therefore, it is critical that we are clear in how we measure these potential impacts and , to the extent practicable, whether alternatives are present to minimize any potential adverse effects.

Finally, NMFS recommends that this be a NPFMC issue for each of the following meetings to, at a minimum provide an update, but more importantly to get a buy-in on the analytical approach used to quantify impacts and identify EFH for each FMP.